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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

INDEPENDENT STEVEDORE COMPANY
AND FIREMAN'S FUND INSURANCE COMPANY,

Appellants,

v.

J. J. O'LEARY, DEPUTY COMMISSIONER, BUREAU OF
EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

BRIEF FOR THE DEPUTY COMMISSIONER

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FILED

AUG 28 1965

FRANK H. SCHMID, CLERK

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. ^{20,148}~~19,871~~

INDEPENDENT STEVEDORE COMPANY
AND FIREMAN'S FUND INSURANCE COMPANY,

Appellants,

v.

J. J. O'LEARY, DEPUTY COMMISSIONER, BUREAU OF
EMPLOYEES' COMPENSATION, UNITED STATES DEPARTMENT OF LABOR,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
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JURISDICTIONAL STATEMENT

This action was brought by appellants in the United States District Court for the District of Oregon, pursuant to Section 21(b) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 921(b), to review and set aside the Deputy Commissioner's Compensation award to the injured claimant.^{1/} On cross-motions for summary judgment, the district court, on

^{1/} The claimant was not made a party to this proceeding nor has he intervened in the same.

April 5, 1965, granted the Deputy Commissioner's motion and denied the motion filed by appellants, i.e., the claimant's employer and its insurance carrier (R. 59). On May 24, 1965, the appellants filed a notice of appeal in the district court (R. 61). The jurisdiction of this Court rests on 28 U.S.C. 1291.

STATEMENT OF THE CASE

On May 26, 1957, Dewey D. Brown sustained injuries to his lower back when, while working as a longshoreman aboard the cargo vessel MS "SUSA," a piece of timber rolled backwards in such a manner that his body received the full weight of the lumber (R. 16). At the time of his injury, and for some time prior thereto, Mr. Brown was in the employ of the Independent Stevedore Company of Coos Bay, Oregon (R. 20, 31).

On February 25, 1958, the longshoreman underwent an operation for "fusion of the lumbar vertebra with the sacrum" (R. 16, 45). His employer's insurance carrier paid him compensation in the amount of \$49.80 per week, for temporary total disability, from May 26, 1957 through July 5, 1960 (R. 16). On or about October 5, 1960, the insurance carrier paid Brown additional compensation in the amount of \$6,215.04, for permanent partial disability (R. 5, 16).

Thereafter, the longshoreman filed an application for review, in accordance with the provisions in Section 22 of the Act, 33 U.S.C. 922, on the ground that there had been a change

in his physical condition (R. 16). On February 5, 1964, a hearing was held before Deputy Commissioner J. J. O'Leary for the purpose of determining "whether Mr. Brown [was] permanently and totally disabled by reason of the injury he sustained on May 26, 1957" (R. 16-17). At the hearing, both the claimant and an orthopedic surgeon called on his behalf testified as to the nature and extent of his disability (R. 19-41). In addition, claimant submitted a medical report (R. 45-47) from Dr. John F. Abele, another orthopedic surgeon, which the Deputy Commissioner admitted into evidence (R. 43). No evidence was submitted by the employer or its insurance carrier (R. 43).

On April 1, 1964, the Deputy Commissioner issued an order awarding claimant additional compensation. He found, inter alia, that the back injury which claimant sustained while loading cargo aboard the MS "SUSA" had "necessitated a spinal fusion . . . on February 25, 1958 . . . [and] that as a result of that surgical operation on February 25, 1958, . . . the disability of the claimant . . . became permanent and total in character on July 6, 1960 . . . " (R. 7). The Deputy Commissioner concluded that the claimant was entitled to permanent total disability payments beginning on July 6, 1960, at the rate of \$49.80 per week, and continuing for the entire period of his disability (R. 7-8).^{2/}

On April 10, 1964, this action, seeking to set aside the compensation award, was instituted by claimant's employer and

2/ The employer and its insurance carrier received a credit for the \$6,215.04 already paid to claimant as permanent partial disability benefits.

its insurance carrier (R. 1-4). They asserted, in part, that the "injury of May 26, 1957, and [the] surgery of February 25, 1958, did not cause Dewey D. Brown to become permanently and totally disabled on July 6, 1960, or at any other time" (R. 3). Cross motions for summary judgment were then filed by the parties and on May 29, 1965, the district court entered judgment for the Deputy Commissioner (R. 59). The court stated that, after reviewing the record as a whole and allowing the Deputy Commissioner his reasonable inference, it was not convinced that the compensation order and award was unsupported by substantial evidence (R. 57-58).

STATUTE INVOLVED

The Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. 901, et seq., provides in pertinent part:

33 U.S.C. 902. Definitions

When used in this chapter -- * * *

(2) The term "injury means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

* * * * *

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

* * * * *

33 U.S.C. 903(a):

Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.* * *

33 U.S.C. 922:

Upon his own initiative, or upon the application of any party in interest, on the ground of a change in conditions or because of a mistake in a determination of fact by the deputy commissioner, the deputy commissioner may, at any time prior to one year after the date of the last payment of compensation, whether or not a compensation order has been issued, or at any time prior to one year after the rejection of a claim, review a compensation case in accordance with the procedure prescribed in respect of claims in section 919 of this title, and in accordance with such section issue a new compensation order which may terminate, continue, reinstate, increase, or decrease such compensation, or award compensation. * * *

ARGUMENT

THE DEPUTY COMMISSIONER'S FINDING THAT CLAIMANT'S DISABILITY RESULTED FROM AN INJURY SUSTAINED DURING THE COURSE OF HIS EMPLOYMENT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

- A. The Limited Scope of Review Under the Longshoremen's and Harbor Workers' Compensation Act

The rule applicable to judicial review of compensation orders, as pronounced by the Supreme Court in O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 508-509 and O'Keefe v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359, 361-362, and by this Court in Morrison-Knudsen Co., Inc. v. O'Leary, 288 F. 2d 542, 543, Hastorf-Nettles, Inc., et al. v. Pillsbury, et al., 203 F. 2d 641, 643, and Crescent Wharf & Warehouse Co. v. Cyr, 200 F. 2d 633, 636, is that the Deputy Commissioner's findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole.^{3/}

Similarly, judicial review of inferences drawn by the Deputy Commissioner is limited to a determination of whether those inferences are supported by substantial evidence and are not inconsistent with law. Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 477-478; see also Contractors PNAB v. Pillsbury, 150 F. 2d 310, 312 (C.A. 9); Liberty Mutual Insurance Co., v. Gray, 137 F. 2d 926, 928 (C.A. 9). In Cardillo, the Supreme Court stated that it is "[t]he Deputy Commissioner alone [who] is charged with the duty of initially selecting the inference which seems most reasonable and his choice, if otherwise sustainable, may not be disturbed by a reviewing court."

^{3/} "Substantial evidence" has been defined, of course, to mean "more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229.

330 U.S. at 478. The only issue properly before the reviewing court in such a situation, is whether there is support for the Deputy Commissioner's conclusion. If there is, the reviewing court's "task is at an end." 330 U.S. at 479.

In the instant case, appellants concede that the claimant sustained a work-connected injury on May 26, 1957 (A. Br. 2). They also concede, as they must, that the record contains substantial evidence to support the Deputy Commissioner's finding that claimant is permanently and totally disabled within the meaning of the Longshoremen's Act (A. Br. 4).^{4/} What appellants challenge is the Deputy Commissioner's finding that claimant's disability is related to his May 26, 1957 injury (A. Br. 4-6). Thus, the sole question before this Court is whether there is substantial evidence in the record to support the Deputy Commissioner's causal relation finding. We submit that -- contrary to appellants' contention (A. Br. 4) -- the record does contain substantial evidence in support thereof.

B. The Record Supports the Deputy Commissioner's Causal Relation Finding.

The evidence before the Deputy Commissioner, at the time he rendered his decision, consisted of (1) the testimony of the claimant, Dewey D. Brown, (2) the testimony of an orthopedic

^{4/} The evidence in the record establishes conclusively that claimant is disabled (R. 20, 25, 29-30, 26-37, 40-41, 45-47).

surgeon, Dr. Winfred H. Clarke, and (3) the medical report of Dr. John F. Abele, another orthopedic surgeon. With respect to the question presently before the Court, the following evidence is significant:

Mr. Brown testified that he injured his back in 1957, while working as longshoreman for the appellant Independent Stevedoring Company (R. 32). Subsequently, claimant stated, he underwent an operation and, several months thereafter, began taking "heat treatments" for his back in Coos Bay, Oregon (R. 32-33). According to Mr. Brown, Dr. Quinn, the physician who administered the "heat treatments," told him that his back condition "was getting worse all the time" (R. 33). Dr. Quinn informed him, after three or four months of treatment, that he would never be able to engage in the activities of longshoreman again (R. 33).

Shortly before filing his application for review, claimant "woke up in the middle of the night . . . [experiencing] awful pain" (R. 33-34). Mr. Brown testified that he "couldn't move" (R. 34). He was taken by ambulance to a hospital in Salem, Oregon, where claimant requested the attending physicians to operate on him in order to relieve the pain (R. 34-35). Claimant stated that they refused to do so (R. 34-35).

Mr. Brown testified that, due to his back condition, he is unable to ride in a car, sit for any length of time or sleep for more than a two hour period (R. 36). He stated that he attempted to paint his picket fence one day, but had to quit

After twenty minutes because his back "hurt terrible" (R. 35). Claimant cannot do any lifting and he cannot even "bend over to pick up a penny" (R. 40). He takes "up to twenty to thirty aspirin a day along with [his pain pills]" (R. 40). Since the date of his injury (May 26, 1957), claimant has not done "any work] at all" (R. 41).

Dr. Clarke testified that Mr. Brown had injured his back in 1957, and that, sometime prior to the date (October 13, 1959) when he first examined claimant, a low back fusion had been performed on him (R. 21-22). The orthopedic surgeon stated that his October 13, 1959 examination of claimant disclosed certain degrees of motion . . . present in his back above . . . the areas . . . that were involved in the fusion" (R. 23). However, Dr. Clarke testified, when he examined Mr. Brown a second time "in July of 1963, he [found] essentially no motion" in the upper part of the back (R. 23). Dr. Clarke stated that the spinal fusion had placed an "extra load . . . on the other part of [claimant's] back" (R. 25). On the basis of his July 1963 findings, Dr. Clarke expressed the opinion that "the contributing part of [claimant's] back problem . . . was his back fusion" (R. 20). In the orthopedist's view, Brown was

"totally disabled from doing any gainful occupation" (R. 20).^{2/}

The only other evidence before the Deputy Commissioner was a medical report dated August 21, 1962 (R. 43). In that report, Dr. John F. Abele, another orthopedic surgeon, noted that claimant had injured his back "while working as a longshoreman," and that, after his "back problems continued, . . . he . . . submitted . . . to a spinal fusion of the lumbar vertebra with the sacrum" (R. 45). The operation was performed by Dr. Donald Slocum of Eugene, Oregon. Dr. Abele stated that his examination of claimant, on November 28, 1961, led him to believe that Mr. Brown's physical condition was such that he "would be very much surprised if this man could be rehabilitated enough to be employed in a gainful activity" (R. 47).

In sum, the evidence establishes that claimant underwent a spinal fusion in 1958, in order to alleviate some of the "back problems" which had arisen by virtue of an earlier work-connected injury (R. 21-22, 45), but that the fusion, instead, resulted in his becoming unable to engage in any gainful occupation (R. 20, 25). The Deputy Commissioner was clearly justified, in light

5/ Dr. Clarke was apparently of the view that, while claimant's back condition rendered him only 40 per cent disabled, from a physical standpoint, it rendered him 100 per cent disabled, as far as his capacity for work was concerned. We note, in this regard, that the courts have consistently stated that, in determining whether a claimant is "disabled" within the meaning of the Longshoremen's Act, the Deputy Commissioner's must look to the claimant's age, education, work experience and job capabilities, as well as his physical condition. See Cunyngham v. Donovan, 328 F. 2d 694 (C.A. 5); McGrath v. Hughes, 289 F. 2d 403 (C.A. 2); Eastern S.S. Lines v. Monahan, 110 F. 2d 840 (C.A. 1).

of this evidence, in finding (R. 7) that the May 26, 1957 "accidental injury . . . necessitated a spinal fusion . . . on February 25, 1958 . . . [and] that as a result of the surgical operation . . . [claimant's] disability . . . became permanent and total in character on July 6, 1960 . . . "

At the very least, the record permitted the Deputy Commissioner, to infer that the May 26, 1957 injury resulted in claimant's disability. See Cardillo v. Liberty Mutual Insurance Co., 330 U.S. 469, 478-479; Crescent Wharf & Warehouse Co. v. City of New York, 200 F. 2d 633, 636 (C.A. 9). For, it contained evidence showing that claimant had to undergo a spinal fusion because of an injury sustained during the course of his employment (R. 32-33, 45) and that he became disabled, subsequently, due to the fusion of his lower back (R. 20, 25).

CONCLUSION

For the foregoing reasons, we respectfully submit that the judgment of the district court should be affirmed.

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AUGUST 1965

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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